No. 10531

In the United States Circuit Court of Appeals for the Ninth Circuit

INVESTMENT AND SECURITIES COMPANY, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The opinion of the District Court (R. 213–224) is reported in 49 F. Supp. 620.

JURISDICTION

This is an appeal from the final judgment of the District Court, entered April 30, 1943 (R. 233–235), denying relief to Investment and Securities Company and awarding to the United States the sum of $6,284 in the hands of the Clerk of the Court as well as future payments made to one Judson G. Rosebush, resulting from his right as a shareholder to participate in dividends payable to the shareholders of the Exchange National Bank, an insolvent national bank-

ing association, a resident of the Eastern District of Washington.

This action was originally brought in the nature of an interpleader by Charles P. Robbins, a citizen and resident of the State of Washington, as Shareholders' Agent for the shareholders of the Exchange National Bank, pursuant to Section 24, Twenty-sixth, of the Judicial Code.

Charles P. Robbins, as Shareholders' Agent, paid into court the total sum of $6,500, being the amount of liquidating dividends due a shareholder, Judson G. Rosebush, and prayed that the Investment and Securities Company, claimant to the fund, and the United States Attorney and his deputies at Milwaukee, Wisconsin, seeking possession of the fund under a writ of *Fieri Facias* issued by the Clerk of the District Court for the Eastern District of Wisconsin, be enjoined from suing cross-defendant and interpleader, Charles P. Robbins. (R. 2–5, 99.)

Investment and Securities Company, a citizen and resident of the State of Washington, on April 2, 1942, filed its complaint in intervention and petition for declaratory relief in the court below. (R. 11.)

Frank J. Kuhl, defendant below, was the Collector of Internal Revenue for Wisconsin. (R. 20.)

Judson G. Rosebush and Barbara J. McNaughton Rosebush, his wife, supplemental defendants below, are citizens and residents of the State of Wisconsin. (R. 130.)

The United States of America, additional intervener below, appeared and filed its answer in inter-

vention (R. 40–44), asserting its right to the money on deposit with the Clerk of the Court on the basis of a tax lien filed against Rosebush by the Collector of Internal Revenue for the Eastern District of Wisconsin, and also on the basis of a judgment in favor of the United States entered by the District Court for the Eastern District of Wisconsin on November 26, 1941 (R. 45–47), against Rosebush in the sum of $37,220.85 plus costs, upon which a writ of *fieri facias* was issued and served upon Charles P. Robbins, cross-defendant and interpleader, on December 1, 1941 (R. 3).

The matter in controversy, exclusive of interest and costs, exceeds in value the sum of $3,000 (R. 3, 99), and involves the construction of Section 3186 of the Revised Statutes, as amended by Section 613 of the Revenue Act of 1928, and Section 276 (c) of the Revenue Act of 1934.

Notice of appeal was filed July 13, 1943. (R. 235–236.) The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether the United States, on July 27, 1937, had a valid lien, under Section 3186 of the Revised Statutes, against certain property and rights to property belonging to Judson G. Rosebush which it is alleged he on that date assigned to Investment and Securities Company.

2. Whether collection of the assessment was barred under the provisions of Section 276 (c) of the Revenue Act of 1928.

STATUTES INVOLVED

Revised Statutes:

> SEC. 3186 [as amended by Section 613 of the Revenue Act of 1928]. (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.
>
> (b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—
>
> (1) in accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or
>
> (2) in the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or
>
> * * * * *

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 276. SAME—EXCEPTIONS.
>
> * * * * *

(c) *Collection after assessment.*—Where the assessment of any income tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

STATEMENT

On July 27, 1937, Judson G. Rosebush, a citizen and resident of the State of Wisconsin (R. 130), was indebted to the United States on account of a deficiency in income taxes assessed against him by the Commissioner of Internal Revenue for the calendar year 1928 in the amount of $37,220.85, including interest (R. 227).

This deficiency assessment was made by the Commissioner of Internal Revenue on February 9, 1934, and appeared on the Commissioner's assessment list for February, 1934 (R. 195, 197), and was received by the Collector of Internal Revenue at Milwaukee, Wisconsin, on February 18, 1934 (R. 98).

On February 27, 1934, written notice and demand for payment was served upon Rosebush (R. 195), and a second notice and demand for payment was served upon him on March 23, 1934 (R. 196).

On April 14, 1934, a warrant for distraint was issued by the Collector of Internal Revenue (R. 197–199), which was served on Rosebush on April 17, 1934 (R. 200).

Notices of tax lien were filed by the Collector of Internal Revenue with the Clerk of the District Court for the Eastern District of Wisconsin at Milwaukee, Wisconsin, on April 19, 1934 (R. 201–203); with the Register of Deeds of Outagamie County, Appleton, Wisconsin, on April 20, 1934 (R. 203, 227).

No notice of lien was ever filed in the State of Washington, either with the Clerk of the District Court for the Eastern District of Washington or the County Auditor of Spokane County, Washington. (R. 17, 99.)

During the year 1937 the United States brought an action against Rosebush (R. 228), and thereafter on November 26, 1941, judgment was entered in favor of the United States against Rosebush in the sum of $37,220.85 on Rosebush's 1928 income-tax liability, plus costs (R. 99, 228).

On July 27, 1937, Rosebush was also indebted to the Investment and Securities Company in the sum of $76,749. (R. 50.) At the time of the failure of the Exchange National Bank, of Spokane, Washington, on January 19, 1929, Rosebush was the owner of 250 shares of its capital stock and by reason thereof paid to the receiver of that bank assessments on his stock totalling $25,000. (R. 13, 21.) When the Investment and Securities Company discovered that Rosebush had paid these assessments and that the Exchange Na-

tional Bank might pay its creditors in full and possibly have something to pay over to its former stockholders who had paid their assessments, it attempted to secure an assignment of the claim of Rosebush against the Exchange National Bank. (R. 173.)

On July 27, 1937, Rosebush executed an assignment to the Investment and Securities Company, dated July 27, 1937 (R. 49–56), the pertinent part of which for present purposes reads as follows (R. 53):

> The party of the second part further agrees to and does hereby assign to party of the first part as security to the balance of indebtedness owing by the party of the second part to party of the first part any recovery which may be made by or on behalf of party of the second part from or on account of an assessment paid on stock of Exchange National Bank, Spokane, Washington, and further agrees to make, execute and deliver to party of the first part any further instruments or documents necessary, needful and proper to make this assignment for collateral purposes effective and to enable party of the first part to recover any amounts which may or shall be due by reason of the payment of such assessments on said Exchange National Bank stock. It is understood that the Collector of Internal Revenue has filed an Order of Distraint against party of the second part and that this assignment is subsequent and junior to any lien against said recovery that said Collector of Internal Revenue may have acquired by virtue of such Order of Distraint.

This assignment of July 27, 1937, was served upon Charles P. Robbins, Shareholders' Agent for the share-

holders of the Exchange National Bank, on March 4, 1938. (R. 99.)

On July 27, 1937, the Investment and Securities Company had actual notice of the claim of the United States to the right to participate in the dividends of the shareholders of the Exchange National Bank and had notice that the United States claimed a prior lien to all moneys coming from Charles P. Robbins, Shareholders' Agent of the Exchange National Bank, to Rosebush as a result of the liquidation of the bank. (R. 229–230.) The notices of the tax lien were recorded prior to Rosebush's assignment to the Investment and Securities Company. (R. 227.) On November 27, 1941, the United States Attorney for the Eastern District of Wisconsin caused a writ of execution to issue against the properties of Rosebush. This writ was served on Robbins, as Shareholders' Agent for the shareholders of the Exchange National Bank, on December 1, 1941. (R. 3.) At the time of the issuance and service of the writ of execution Robbins, as Shareholders' Agent, owed Rosebush the sum of $4,250. Thereafter, an additional sum of $2,250 became due, making a total of $6,500 due and owing Rosebush as the result of his right to participate in the dividends of the shareholders of the Exchange National Bank. (R. 228.)

Charles P. Robbins, as Shareholders' Agent for the shareholders of the Exchange National Bank, of Spokane, Washington, filed his complaint in the nature of an interpleader and paid to the Clerk of the District Court for the Eastern District of Washington the

total sum of $6,500 praying that the Investment and Securities Company and the United States Attorney and his deputies at Milwaukee, Wisconsin, be enjoined from suing him as such Shareholders' Agent. (R. 2–5, 99.) The District Court, on April 28, 1943, entered its findings of fact and conclusions of law (R. 226–232), and thereupon entered judgment in favor of the United States to the extent of the sum of $6,284 then in the hands of the Clerk of the District Court and awarded the United States any future payments resulting from Rosebush's right to participate in the dividends payable to the shareholders of the Exchange National Bank (R. 233–234). From this judgment the Investment and Securities Company appealed to this Court. (R. 235–236.)

SUMMARY OF ARGUMENT

The property involved constituted intangible personal property and its situs, under the maxim *mobilia sequuntur personam*, was the domicile of its owner—Wisconsin. The notice of tax lien filed at the domicile of the taxpayer attached to all intangible property of the taxpayer, including the intangible asset here involved. The writ of execution issued in a suit filed at the domicile of the taxpayer was begun less than six years from the date of the assessment of the tax, February 9, 1934, hence recovery is not barred by the statute of limitations. Even assuming *arguendo* that the notice of lien did not cover the funds involved here, appellant is not entitled to priority over the Government's lien on the fund since the lien attached as against all except those specifically excepted by Re-

vised Statutes, Section 3186, as amended by Section 613 of the Revenue Act of 1928. Hence, the appellant must not only show that the notice of lien did not cover the property, but it must, in addition, bring itself within the statute by showing that it was a mortgagee or purchaser. This it failed to do. (1) The assignment was for a pre-existing debt; (2) the taxpayer took with actual notice of the Government's lien for taxes; and (3) the assignment specifically provides that the rights of appellant are subsequent and junior to the prior claim of the Government for taxes.

ARGUMENT

I

The United States, on July 27, 1937, had a valid lien against certain property and rights to property belonging to Judson G. Rosebush which on that date he assigned to the Investment and Securities Company

It is undisputed that the Government's lien under the provisions of Section 3186 (a) of the Revised Statutes, as amended by Section 613 of the Revenue Act of 1928, *supra,* arose on the receipt by the Collector of Internal Revenue on February 18, 1934, of the Commissioner's assessment list, the section providing that the lien should "continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." It is also undisputed that notices of the Government's tax lien (after the Collector's demand for payment had been refused by the taxpayer as well as payment under the Collector's warrant of distraint) were filed by the Collector with the Clerk of the District Court for the Eastern Dis-

trict of Wisconsin at Milwaukee, Wisconsin, on April 19, 1934, and with the Register of Deeds at Appleton, Outagamie County, Wisconsin, the taxpayer's domicile, on April 20, 1934.

The Government's tax lien upon the filing of the notices of lien became a specific statutory lien upon "all property and rights of property, whether real or personal" belonging to the taxpayer.

1. The notice of tax lien filed at the domicile of the taxpayer attached to all intangible property of the taxpayer, including the intangible asset involved here.

Section 3186 of the Revised Statutes, as amended by Section 613 of the Revenue Act of 1928, provides that if

> * * * any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon *all* property and rights to property, whether real or personal, belonging to such person. * * * (Italics supplied.)

The word "all" is all inclusive. In the absence of clear intention on the part of Congress to limit its meaning, no reason exists to apply a definition foreign to accepted usage.

Although on July 27, 1937, the taxpayer's right to share in the liquidating dividends payable by the Shareholders' Agent was an unliquidated right and the amount was undetermined, it was, nevertheless, a presently existing right of which he was the owner. *Matter of Rosenberg,* 269 N. Y. 247, 199 N. E. 206, certiorari denied, 298 U. S. 669. Cf. *United States*

v. *Canfield,* 29 F. Supp. 734 (S. D. Cal.). Even if it could be considered as having arisen after the notices of tax lien were filed by the Government in the state of the taxpayer's domicile, it was, nevertheless, subject to the Government's tax lien. *Citizens Nat. Trust & S. Bank of Los Angeles* v. *United States,* 135 F. 2d 527 (C. C. A. 9th).

Where such a right may be brought within the dominion and control of a court it is "'property or rights of property' although intangible in character." *Citizens State Bank of Barstow, Tex.* v. *Vidal,* 114 F. 2d 380 (C. C. A. 10th).

It is settled, we think, that the taxpayer, as a contributing shareholder, could have maintained an action at law against the receiver of the bank or the Shareholders' Agent to recover his share of the liquidating dividends after the payment of all of the obligations of the insolvent bank. *McCarty* v. *Gault,* 24 F. Supp. 977, 990 (Ore.).

(a) ***The situs of the property when the Government's notices of lien were filed and when the assignment was made on July 27, 1937, was the State of Wisconsin***

The taxpayer's right to share in the liquidating dividends payable by the Shareholders' Agent, or by the receiver of the bank, was intangible personal property and therefore, under the maxim *mobilia sequitur personam,* its situs at the time the Government's notice of tax lien was filed and at the time the assignment was made by the taxpayer to appellant on July 27, 1937, was the domicile of the owner, Appleton, Outagamie County, Wisconsin. *Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204; *Baldwin* v. *Missouri,* 281

U. S. 586; *Beidler* v. *So. Car. Tax Commission,* 282 U. S. 1; *First National Bank* v. *Maine,* 284 U. S. 312.

As stated by the Supreme Court in *First National Bank* v. *Maine, supra* (pp. 329–330):

> Ownership of shares by the stockholder and ownership of the capital by the corporation are not identical. The former is an individual interest giving the stockholder a right to a proportional part of the dividends and the effects of the corporation when dissolved, after payment of its debts. * * * And this interest is an incorporeal property right which attaches to the person of the owner in the state of his domicile.

The Government, by filing notice of lien in the city, county and state where the taxpayer was domiciled, obtained a valid, enforceable lien under the provisions of Section 3186 (a) against the taxpayer's intangible personal property, the situs of which was the domicile of the owner—Wisconsin. The Government's lien was, therefore, enforceable not only against the taxpayer but any person claiming under him.

Indeed, appellant apparently concedes (Br. 21) that we are dealing in this case with intangible personal property as to which the Supreme Court of the State of Washington has held Section 3779 of V Remington's Revised Statutes of the State of Washington (1931) (dealing with the recording of chattel mortgages "upon all kinds of personal property"), inapplicable as to intangible property such as accounts and income and choses in action. See *Heermans* v. *Blakeslee,* 97 Wash. 647, 167 Pac. 228, and *Hughes,*

Inc. v. *Widders,* 187 Wash. 452, 60 P. 2d 243. Under these decisions the Government's lien could not have been recorded in the State of Washington nor could appellant's assignment have been recorded there upon the same intangible personal property. Indeed, if the Government's notices of lien had not been filed in Wisconsin its lien would have been ineffective against appellant, as is shown by the recent decision of the District Court for the Northern District of California on July 21, 1943, in the case of *United States* v. *Spreckels,* 50 F. Supp. 789. In that case the court denied the Government's claim to certain intangible personal property against which a judgment had been recorded in San Mateo County, California, on November 14, 1936. In denying the Government's claim to a prior lien the court said (pp. 791–792):

> The lien of the Government was properly recorded in Kings county and attached to the real property located there prior to the time it was executed upon by the bank. The balance of the property to which the bank makes claim under its judgment (with the exception of certain land in Tulare county where no lien was recorded by the Government) consists of intangible personal property. *Following the general rule that the situs of such property is the domicile of the owner, the Government should have recorded its lien in San Mateo county where the taxpayer resided. This was not done until 1937, after the bank had executed on such property under its judgment.*
>
> I conclude that the rights of the banks should prevail as to all property acquired under its

judgment except the real property located in Kings county, upon which the United States had a valid and existing lien as against all the world, at the time execution was issued. (Italics supplied.)

II

Appellant was neither a mortgagee nor a purchaser within the meaning of Section 3186 (b) of the Revised Statutes, as amended by Section 613 of the Revenue Act of 1928

Section 3186 (b) of the Revised Statutes contains the following provisions:

> (b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector—
>
> (1) in accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing of such notice; or
>
> (2) in the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or
>
> * * * * *

Appellant contends (Br. 18) that under these provisions it was a mortgagee, or at least a purchaser, and that, as to it, the Government's tax lien was therefore invalid. Even assuming arguendo that the notice of lien did not cover the funds involved here, appellant is not entitled to priority over the Government's lien on the fund since the Government's lien attached

as to all except those specifically mentioned in Revised Statutes, Section 3186, as amended by Section 613 of the Revenue Act of 1928, upon the Collector's receipt of the assessment list. *Equitable Life Assur. Soc.* v. *Moore,* 29 F. Supp. 179 (S. D. Ill.). Hence, appellant must not only show that the notice of lien did not cover the property, but it must, in addition, bring itself within the statute by showing that it was a mortgagee or purchaser. *MacKenzie* v. *United States,* 190 F. 2d 540 (C. C. A. 9th). This it has failed to do.

1. The assignment was for a pre-existing debt

This will be shown by consideration of the full terms of the assignment agreement. (R. 49–56.) It is there shown that the taxpayer was indebted to appellant on two notes given in 1932 which were secured by certain stocks. The indebtedness not having been paid, appellant, on April 22, 1936, conducted a sale, and, there being no other bidders, bid in the collateral and applied the proceeds to the taxpayer's indebtedness. (R. 51–52.) The taxpayer challenged the validity of the sale of 820 shares of Inland Empire Paper stock bid in by appellant for $1. Appellant desired to obtain the taxpayer's approval of the sale and the assignment of his claim to participate in the liquidating dividends of the Exchange National Bank and to that end was "willing to afford the Pledgor certain opportunities to reacquire said stock" (R. 51–52), upon what terms we do not know. The taxpayer had no choice in the matter. The real consideration, however, for his assignment was the taxpayer's pre-existing debt.

This certainly was not a present consideration paid by appellant for the assignment and therefore appellant was not a "purchaser" or etc. within the meaning of Section 3186 (b). *Filipowicz* v. *Rothensies,* 43 F. Supp. 619 (E. D. Pa.). Nor, under the circumstances, was appellant a "mortgagee" within the meaning of the statute. Section 3780 of Remington's Revised Statutes of Washington requires an affidavit of good faith. No such affidavit was attached to the assignment. See *Heermans* v. *Blakeslee, supra.*

Nor was appellant a "pledgee." Subsequent to the execution of the agreement of July 27, 1937, and in 1939, Congress amended the section by Section 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862, 892, by inserting the word "pledgee" immediately following the word "mortgagee." The section was not made retroactive, however, and has no application here.

2. The appellant took with notice of the Government's lien for taxes

The correspondence between the appellant and the taxpayer covering the period from March 29, 1937, to July 27, 1937 (R. 171–190), shows conclusively that appellant, prior to the assignment of July 27, 1937, had actual notice of the Government's claim and lien for taxes assessed against the taxpayer and of the warrant of distraint outstanding against him. The court below so found (R. 229–230), and appellant concedes that (Br. 17). The registry feature of the tax lien law, first added in 1913, was intended to protect only innocent mortgagees, purchasers and judgment creditors, i. e., those without notice, and

appellant, having had actual notice of the Government's claim and tax lien when it took the assignment of 1937, is second in right, not first.

Section 3186 of the Revised Statutes, as amended by Section 3 of the Act of March 1, 1879, c. 125, 20 Stat. 327, had been applied in 1893 as creating a lien in favor of the Government good even as against bona fide purchasers and encumbrancers. *United States* v. *Snyder,* 149 U. S. 210, 214. The agitation which arose because of that decision culminated in the enactment by Congress of the amendment by the Act of March 4, 1913, c. 166, 37 Stat. 1016, which as against any mortgagee, purchaser or judgment creditor required, as a condition to its validity, that the Government's lien "be filed by the collector in the office of the clerk of the district within which the property subject to the lien is situated." Section 3186 was further amended by Section 613 of the Revenue Act of 1928, the Act with which we are here concerned. The Act is obviously a registry or record law. In 1868 the Supreme Court declared the purpose of such a law to be to impart information. The Court said in *Patterson* v. *De la Ronde,* 8 Wall. 292, 300–301:

> Besides, the object of all registry laws is to impart information to parties dealing with property respecting its transfers and incumbrances, and thus to protect them from prior secret conveyances and liens. It is to the registry, therefore, that purchasers, or others desirous of ascertaining the condition of the property, must look, and if not otherwise in-

> formed, they can rely upon the knowledge there obtained. But if they have notice of the existence of unregistered conveyances and mortgages, they cannot, in truth, complain that they are, in any respect, prejudiced by the want of registry. In equity, *and in this country generally at law,* they are not permitted to defeat, under such circumstances, the rights of prior grantees or incumbrancers, but are required to take the title or security in subordination to their rights. The general doctrine is that knowledge of an existing conveyance or mortgage is, in legal effect, the equivalent to notice by the registry. * * *

That actual notice of a federal tax lien takes the place of record notice, has been held by the Circuit Court of Appeals for the Fifth Circuit in *Heyward* v. *United States,* 2 F. 2d 467, and in the case of *In re Glover-McConnell Co.,* 9 F. 2d 683, 689 (N. D. Ga.). These cases are applied in *Continental Baking Co.* v. *Helvering,* 75 F. 2d 243, 244, by the Court of Appeals for the District of Columbia. They are also cited in a footnote to *Phillips* v. *Commissioner,* 283 U. S. 589, 593. *Contra: United States* v. *Beaver Run Coal Co.,* 99 F. 2d 610 (C. C. A. 3d). The case at bar goes much deeper. As we have already pointed out, the Court in this case is dealing with intangible personal property, the situs of which is the domicile of the owner—Wisconsin. If that be true, and we submit that it is, then the Government's notices of tax lien were properly filed at the domicile of the owner of the property, and the Government's lien was therefore notice to the world. Appellant knew where the

taxpayer lived. It had actual notice of the Government's lien against the taxpayer. With actual notice of the Government's lien and of the warrant of distraint, it would seem that appellant is in no position to claim that its rights are superior to those of the Government.

3. The assignment specifically provides that the rights of the appellant are subsequent and junior to the prior claim of the Government for taxes

The assignment contained the following specific provision (R. 53):

> *It is understood that the Collector of Internal Revenue has filed an Order of Distraint against party of the second part and that this assignment is subsequent and junior to any lien against said recovery that said Collector of Internal Revenue may have acquired by virtue of such Order of Distraint.* (Italics supplied.)

It is clear that this provision, inserted because of the insistence of the taxpayer, gave to appellant no rights as against the claim and lien of the United States for income taxes assessed against the taxpayer. What appellant took under the assignment was only that which the taxpayer intended it should take—a right subsequent and junior to that of the United States. Appellant is in no position to complain about the condition incorporated into the agreement at the insistence of the taxpayer. The correspondence shows that the appellant could not have obtained the assignment from the taxpayer otherwise We submit that the Government's tax lien and its judgment lien were valid and enforceable against the fund held by

the Shareholders' Agent for the taxpayer, representing his right to share in the liquidating dividends payable to the shareholders of the Exchange National Bank.

III

Collection of the deficiency assessment made by the Commissioner on February 9, 1934, was not barred by the provisions of Section 276 (c) of the Revenue Act of 1928

The pertinent provisions of Section 276 (c) of the Revenue Act of 1928, *supra,* provide a limitation period for the collection of any income tax assessment. Such collection may be made, however, "by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax * * *."

It is not disputed that the Commissioner's income tax assessment for 1928 income taxes (R. 227) was made against the taxpayer in February, 1934.*

At the outset it may be conceded that no extension of the six-year period of limitation for the collection of the tax was ever executed by the taxpayer. The cases cited by appellant, dealing with the effect of waivers of the statutory limitation period for collection, obviously have no application here.

1. The writ of execution issued in a suit filed at the domicile of the taxpayer was begun less than six years from the date of the assessment of the tax; hence recovery is not barred by the statute of limitations

Suit for the recovery of the amount of the deficiency assessment made by the Commissioner was

*The warrant of distraint (R. 197) shows the date to be February 9, 1934.

filed by the United States against the taxpayer in the District Court for the Eastern District of Wisconsin, his domicile, during the year 1937, within six years from the date of the Commissioner's assessment, and thus within the period of limitations laid down by Section 276 (c), *supra*. The suit was therefore timely brought.

In this suit the District Court for the Eastern District of Wisconsin, on November 26, 1941, entered judgment against the taxpayer in the sum of $37,-220.85, plus costs.

On November 27, 1941, the United States Attorney for the Eastern District of Wisconsin caused a writ of execution to be issued on the judgment which, on December 1, 1941, was served on Charles P. Robbins, as Shareholders' Agent for the shareholders of the Exchange National Bank.

On that date Robbins, as Shareholders' Agent for the shareholders of the Exchange National Bank, had in his possession the sum of $4,250 and later an additional sum of $2,250 due and owing the taxpayer as the result of his right to participate in the liquidating dividends payable to the shareholders of the Exchange National Bank; and these amounts, totalling $6,500, were thereafter paid by Robbins to the Clerk of the District Court for the Eastern District of Washington. We submit that the action brought by the United States was timely and tolled the period for collection laid down by Section 276 (c), and that the judgment in favor of the United States was enforceable against all property and rights of property belonging to Rosebush, wherever situated and without

limitation. Appellant's contention that the United States was required to bring effective proceedings for the collection of the tax in the State of Washington before the expiration of the six-year period of limitations laid down by Section 276 (c), is clearly without merit and in that connection we cite the decision of the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Havner,* 101 F. 2d 161, where the court, in disposing of a similar contention, said (pp. 164–165):

> There remains to be considered the contention of the taxpayer that whatever judgments the Government succeeds in obtaining in this action have become unenforceable or will become unenforceable after the expiration of the period of limitation calculated from the time when the taxes were assessed, because it was the intention of Congress, in enacting Section 276 (c), that no proceedings to collect should be taken after the statutory period had run, regardless of whether the Government had commenced a timely proceeding to reduce the tax liability of the taxpayer to judgment or not. This contention is ingenious but obviously unsound. The liability of a taxpayer to the Government is a debt and is subject to collection in the same way that other debts are collectible. *Price* v. *United States,* 269 U. S. 492, 500, 46 S. Ct. 180, 70 L. Ed. 363, and cases cited. In *Bowers* v. *New York & Albany Lighterage Co.,* 273 U. S. 346, 47 S. Ct. 389, 71 L. Ed. 676, the Supreme Court, in discussing the question as to whether Section 250 (d) of the Revenue Act of 1921, 42 Stat. 265—which provided that "no suit or proceeding for

the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed * * *",— barred collection by distraint proceedings begun after the expiration of the period of limitation, said (page 349, 47 S. Ct. page 390):

"There are two methods to compel payment. One is suit, a judicial proceeding; the other is distraint, an executive proceeding. The word 'proceeding' is aptly and commonly used to comprehend steps taken in pursuit of either. There is nothing in the language or context that indicates an intention to restrict its meaning, or to use 'suit' and 'proceeding' synonymously.

"The purpose of the enactment was to fix a time beyond which *steps to enforce collection* might not be initiated. The repose intended would not be attained if suits only were barred, leaving the collector free at any time to proceed by distraint." (Italics supplied.)

Section 276 (c) provides that income taxes "may be collected * * * by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period." It is obvious that the sole purpose of this enactment was to fix a time beyond which "steps to enforce collection might not be initiated." It adds nothing to the power of the Government to sue, but places a time limitation upon its right to sue. * * *

> The right to initiate a suit to enforce collection of a tax necessarily implies the right to have its fruits, namely, judgments which are enforceable by execution. No doubt Congress might have provided for a period of limitation beyond which judgments obtained by the Government for taxes should be unenforceable, but, in the absence of any statute providing such a limitation, we think no court has power to restrict the right of the Government to enforce a judgment to which it is lawfully entitled.

* * * * *

Under the writ of execution issued to enforce its judgment lien against the taxpayer the Government was clearly entitled to enjoy the fruits of its judgment as against appellant's unrecorded assignment of July 27, 1937.

CONCLUSION

The judgment of the court below is correct. It should be affirmed by this Court.

Respectfully submitted,

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